**Thermal Masters, Inc. *and* Milwaukee & Southern Wisconsin District Council of Carpenters, affiliated with the United Brotherhood of Carpenters and Joiners of America, AFL–CIO.** Cases 30–CA–12432 and 30–RC–5561

July 31, 1995

## DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On May 12, 1995, Administrative Law Judge Richard A. Scully issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Thermal Masters, Inc., Milwaukee, Wisconsin, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Add the following as paragraph 2(b) and reletter the subsequent paragraphs.

''(b) Remove from its files any reference to the unlawful layoffs and notify the employees in writing that this has been done and that the layoffs will not be used against them in any way.''

2. Substitute the attached notice for that of the administrative law judge.

[Direction of Second Election omitted from publication.]

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order to include the Board's traditional mandate to remove from the Respondent's files any references to the unlawful layoffs. We shall also substitute a new notice so that it conforms to the Order as modified.

## APPENDIX

### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten our employees with business closure or loss of benefits because of their support for the Milwaukee & Southern Wisconsin District Council of Carpenters, affiliated with the United Brotherhood of Carpenters and Joiners of America, AFL–CIO or any other labor organization.

WE WILL NOT tell our employees that they were laid off because of their support for the Union or any other labor organization.

WE WILL NOT offer our employees benefits if the Union or any other labor organization loses a representation election or if unfair labor practice charges are dropped.

WE WILL NOT discriminatorily lay off our employees because of their support for the Union or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole Tim Sutter, Paul Weyker, Robert Kuhn, Todd Larkee, Richard Wilcox, Ronald Dixon, and Robert Czajkowski for any loss of earnings or benefits suffered as the result of their discriminatory layoffs, with interest.

WE WILL notify each of them that we have removed from our files any reference to their layoffs and that the layoffs will not be used against them in any way.

THERMAL MASTERS, INC.

*Joyce Ann Seiser, Esq.*, for the General Counsel.
*Alan M. Levy, Esq.*, of Milwaukee, Wisconsin, for the Respondent.
*Thomas R. Doleschy*, of Milwaukee, Wisconsin, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

RICHARD A. SCULLY, Administrative Law Judge. On a charge filed on February 17, 1994,[1] by Milwaukee & Southern Wisconsin District Council of Carpenters, affiliated with the United Brotherhood of Carpenters and Joiners of America, AFL–CIO (the Union), the Regional Director for Region

[1] All dates are in 1994 unless otherwise indicated.

30 of the National Labor Relations Board (the Board) issued a complaint on March 31, alleging that Thermal Masters, Inc. (the Respondent) had committed certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Respondent filed a timely answer denying that it has committed any violation of the Act. On May 12, the Regional Director issued an order consolidating this unfair labor practice proceeding with Case 30–RC–5561, after concluding that the issues raised by the Petitioner Union's objections in that representation proceeding involve substantial questions of fact and credibility that can best be resolved by a hearing, that those questions are similar to those raised by the aforementioned complaint, and that the cases should be consolidated for hearing, ruling, and decision.

A hearing was held in Milwaukee, Wisconsin, on January 17, 18, and 19, at which all parties were given a full opportunity to participate, to examine and cross-examine witnesses, and to present other evidence and argument. Briefs submitted on behalf of the General Counsel and the Respondent have been given due consideration. On the entire record and from my observation of the demeanor of the witnesses, I make the following

## FINDINGS OF FACT

### I. THE BUSINESS OF THE RESPONDENT

At all times material, the Respondent was a corporation with an office and facilities in Milwaukee, Wisconsin, engaged in the business of installing insulation.

During the calendar year 1993, the Respondent, in conducting its business operations, purchased and received products, goods, and materials at its Milwaukee facilities valued in excess of $50,000 directly from points located outside the State of Wisconsin. The Respondent admits, and I find, that at all times material it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

### II. THE LABOR ORGANIZATION INVOLVED

The Respondent admits, and I find, that at all times material the Union was a labor organization within the meaning of Section 2(5) of the Act.

### III. THE ALLEGED UNFAIR LABOR PRACTICES

#### A. *Background*

The Respondent is a building contractor specializing in insulation installation. It was formed approximately 3 years ago to be the contracting division of a group of insulation distributing companies with which it is associated. Its employees do interior work, including drywalling, fireproofing, and batt, blown, and foam insulation, and exterior work, involving the application of exterior insulation finish systems, known as ''EIFS.'' The Union represents approximately 10 of the Respondent's employees who perform batt interior work within Milwaukee and seven adjoining counties in southeastern Wisconsin. The EIFS work and the interior insulation work it has done outside of that geographical area have been performed by nonunion employees.[2]

[2] Hereinafter, these nonunion employees are referred to as the EIFS employees.

Beginning in December 1993, EIFS employees Tim Sutter and Paul Weyker began discussing the possibility of representation by the Union among themselves and others. Weyker contacted Union Representative Thomas Doleschy and a meeting was eventually held on January 26, which about five employees attended. They discussed the benefits of representation by the Union and signed authorization cards. A second meeting was held on February 18 at which two additional employees signed cards. Pursuant to a petition filed by the Union on February 22, the Board conducted an election among the EIFS employees on April 7, which the Union lost. Thereafter, it filed objections to the Respondent's conduct.

#### B. *The 8(a)(1) Allegations*

##### 1. The February 2 meeting

The complaint alleges that on February 2, at a jobsite in Mequon, Wisconsin, Company Vice President Lloyd Gleason threatened employees with business closure, loss of benefits, and discharge because of their union activities and support. Sutter testified that Gleason came to the jobsite and held a meeting with the employees working there, including Supervisor Howard Cleary. Gleason said that he had heard that they were ''talking about organizing a union'' and they told him that they had checked into union benefits and wages. Gleason responded that his wages and benefits were better. He got upset after a remark by employee Ronald Dixon and said that if they went union he could shut his doors and fire them and that he did not want a union telling him how to run his business. He also told Sutter and employee Kevin Sagmo that they had ''a lot to lose in profit sharing.'' Dixon testified that Gleason stated that he would not have a union company or a union person telling him how to run his Company and would not have anything to do with a union. Dixon asked if he was saying that if they tried to get a union in they would be fired. Gleason did not say yes or no, but said it was his Company and he could do whatever he wanted. Their discussion began to get more heated and Gleason told him that if the Company went union there would be no work because he would have to charge more to pay them and there was too much competition out there.

Cleary testified that several of his employees had told him they were considering union representation. He told Gleason about this and what they had said the Union told them about wages and benefits. He suggested that Gleason speak to them and he came to the Mequon job the following day. Cleary testified that Gleason told them that he had heard about the promises the Union was making and he wanted to be sure they knew what the Company had to offer. He told them to get the facts on both sides and suggested that they talk to some of the Company's union employees. He testified that he was present throughout the meeting and that Gleason did not say that he would close the business or fire anybody and did not say the Company could not compete if the employees went union. He did say that if they voted for a union the Company and the Union would have to sit down and negotiate a contract. Gleason testified that he visited the Mequon jobsite and talked to the employees about the Union. He told them they should get all the facts before they made a decision and told them they could get information from the Com-

pany's union employees. He said he did not tell them that he would close the Company or that they could be fired.

Analysis and conclusions

I found Dixon to be a believable witness and credit his testimony as to what Gleason said to the employees on February 2. He appeared to have the best recollection of the meeting. His testimony establishes that, while Gleason did not specifically threaten to fire the employees because of their union support, he did say that he would not continue in business if the Union were to represent them and that he could not pay union wages and remain competitive.[3] I do not credit the testimony of Cleary or Gleason about the meeting. Although both offered general testimony that Gleason sought to explain what the Company had to offer, neither attempted to describe what was actually said during the course of the meeting which Dixon estimated lasted approximately 20 minutes.[4] By telling the employees that the Respondent would not be a union company and would not have anything to do with a union, Gleason in effect said that the business would close if they selected the Union as their bargaining representative. Similarly, his statement that if they went union there would be no work because the Respondent could not pay union wages and be competitive was an unlawful threat of business closure. There is no evidence that this conclusion was ''carefully phrased on the basis of objective fact,'' that it conveyed the ''employer's belief as to demonstrably probable consequences beyond his control'' or that it was ''a reasonable prediction based on available facts.'' *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). I find that these statements constituted unlawful threats of business closure and violated Section 8(a)(1) of the Act. *Pincus Elevator & Electric Co.*, 308 NLRB 684, 691 (1992); *Somerset Welding & Steel*, 304 NLRB 32, 45 (1991). I credit Sutter's testimony that Gleason told him and another employee that they had a lot to lose in profit sharing if the Union came in.[5] Again, I do not consider the general denials of Gleason and Cleary sufficient to contradict Sutter's specific testimony about this subject. I find that Gleason's statement implied a probability that the Employer would act differently with respect to profit sharing if the Union was voted in and constituted a threat of loss of a benefit in violation of Section 8(a)(1). *Monfort of Colorado*, 298 NLRB 73, 85 (1990).

2. February 16 telephone conversation

During February, several employees were laid off, including Sutter and Weyker.[6] Sutter testified that on February 16, he placed a telephone call to Gleason and asked why the employees on his crew had been laid off. Weyker was present at his home and listened to the conversation on an extension phone without Gleason's knowledge. In response to Sutter's inquiry, Gleason said that by going to the Union and trying to organize a union at the Company, it showed him that Sutter and others, whom he identified as Weyker, Rich Wilcox, Rob Kuhn, and Todd Larkee, did not care about their jobs. When Sutter said that Wilcox was still working, Gleason said that he was working in La Crosse, but when he got back he would be laid off. Sutter testified that Gleason told him that if he had not gone to the Union, he would still be working. He also said that Sutter was permanently laid off and should turn in his tools. Weyker testified that he listened to part of the telephone conversation between Sutter and Gleason. He said that, while he was listening, he heard Sutter ask why he had been laid off and Gleason say that by going down to the Union the guys showed him that they didn't care about the Company, and that they had turned their backs on him and had showed that they wouldn't mind being laid off.

Gleason testified that he was telephoned at the office by Sutter who asked him about being laid off. Gleason told him that he was permanently laid off but that he was not fired. He did not give Sutter any reason why he had been selected for layoff. He testified that he did not tell Sutter that he and others were laid off because they turned their backs on the Company or say anything similar during this telephone conversation.

Analysis and conclusions

Resolution of this issue depends solely on a determination of credibility. Although I found that Sutter was less than forthright in his testimony about his transportation problems while employed by the Respondent, it was unrelated to this issue and I do not find that it rendered the balance of his testimony unworthy of belief. This is particularly true in this instance when his testimony is corroborated by that of Weyker, whom I found to be a credible and persuasive witness.[7] I credit the detailed testimony of Sutter and that of Weyker concerning this conversation and find that Gleason said that Sutter and the others were laid off because they had gone to the Union. It is Gleason's version of the conversation that is incredible. Although the Respondent contends Sutter made the call with Weyker secretly listening in on an extension in order to lead him into committing an unfair labor practice, according to Gleason's version the employees' activities and support for the Union was not mentioned by either Sutter or Gleason. This is in contrast to his testimony about two or three subsequent telephone conversations he claims to have had with Weyker in which Weyker continually asked if his union activity was involved in his layoff and Gleason assured him that it was not. This struck me as an attempt to divert attention from his conversation with Sutter by claiming that he did not make unlawful statements to Weyker. I find that his testimony establishes only that if there were any such subsequent conversations with Weyker, by that time, Gleason had become more circumspect. The Respondent's telling Sutter that he and other employees were laid off because of their union activity and support was coer-

[3] With the exception of his saying that Gleason said he could fire them for going union, Sutter's testimony generally corroborated that of Dixon about the meeting.

[4] I found their testimony as to what occurred at the meeting so limited and similar as to suggest collusion. I do not consider their negative answers to leading questions by the Respondent's counsel sufficient to contradict Dixon's specific and detailed testimony about what Gleason said at the meeting.

[5] Although Dixon did not mention this threat, he did say that at one point Sutter and Gleason ''kind of went at it,'' but that he was not paying attention to all that was said.

[6] The legality of this and other layoffs is discussed below.

[7] I do not find the fact that Weyker failed to recall a second truck accident in September 1993, while testifying about his driving record on direct, undermines his otherwise credible testimony. On cross-examination, he volunteered that he had had the second accident.

cive and violated Section 8(a)(1). *Jay Metals*, 308 NLRB 167, 171 (1992); *Uptilt, Inc.*, 276 NLRB (1985).

### 3. The restaurant meeting

The complaint alleges that during late March the Respondent unlawfully offered employees benefits in the event the Union lost the election. Robert Kuhn testified that while he was on layoff he had several telephone conversations with Gleason about the upcoming union election and his unhappiness with the wage he was receiving. Eventually, Gleason proposed that they meet at a restaurant to discuss things. At Kuhn's request, Sutter was also invited and attended this meeting. At the meeting, Kuhn expressed his dissatisfaction with the 50-cent-per-hour wage increase he had received in January and Gleason responded that the reason he had not gotten a better raise was that he and Sutter ''were not talking at the time.'' Gleason said that after the election he would be able to give him a better raise than he had gotten in the past, that he could not give him a precise figure, but that it ''would not be a $5.00 raise.'' During the conversation Gleason said that ''it was not right'' that Sutter and Weyker had been laid off and that Kuhn ''was a victim of that circumstance.'' Gleason did not say anything about what would happen if the Union won the election and only ''discussed what would happen if the Union was voted down.'' Sutter testified that around the end of March Gleason called and invited him out to lunch. At that meeting, which Kuhn also attended, Gleason told them that he could show them that his benefits were better than the Union's. Kuhn complained about his wage rate and Gleason agreed that he should be making more money per hour and that it was something they would talk about after the election.

Gleason testified that he arranged the meeting to explain the Company's benefits to Kuhn who, along with Sutter and Weyker, had walked out of another meeting held to explain them. Sutter was invited to the restaurant meeting at Kuhn's request. As he was explaining the benefits, Kuhn asked why he was not making more money. Gleason responded that he could not talk about that and that the meeting was being held to discuss benefits. Sutter said very little except about how he would like to have the crews structured. He did not offer either any kind of raise.

#### Analysis and conclusions

Although he was obviously very nervous and anxious during parts of his testimony, based on my observation of his demeanor, I conclude that Kuhn was making a sincere effort to testify truthfully about the restaurant meeting. Although somewhat disjointed, his testimony struck me as being the result of an sincere effort to recall the meeting, which was held 10 months before, rather than as a fabrication.[8] It was clear that Kuhn's main concern at the time was his wage rate and the fact that he had not received a raise of the magnitude he had expected and felt he deserved. He had raised this with Gleason several times before, along with his concerns that he could not purchase a house and otherwise provide for his family as he wanted unless he got a wage increase. I find that the meeting was set up to address those concerns and not merely to explain the Respondent's existing benefits. I credit Kuhn's testimony and find that Gleason promised him a wage increase of an unspecified amount after the election so long as the Union was defeated. This was an unlawful promise of a benefit and violated Section 8(a)(1). *Pembrook Management*, 296 NLRB 1226, 1240 (1989); *Churchill's Supermarkets*, 285 NLRB 138, 140 (1987).

### 4. Benefits in return for dropping unfair labor practice charges

Weyker testified that about a week after the union election he attended a meeting at the Company for all employees who had been or were to be lead people on jobs. After the meeting ended, Gleason asked Weyker and Sutter, who were considering taking other employment, to come into his office where they discussed what it would take to keep them working for the Respondent. They discussed some figures and Gleason said that he could give them $16.50 an hour by the end of September and that they would be given a truck allowance. He also said that they ''would have to do something about this National Labor Board thing'' and that they could talk to his lawyer about dropping it if they stayed on. Weyker said he would get back to him and spoke to him again a week later. Gleason repeated that, if he stayed, Weyker would get $16.50 an hour in September and a truck allowance. Sutter testified that he and Weyker had met with Gleason after an employee meeting but said it was during the week of the election or the week before. He testified that Gleason said that the union issue had gone far enough and it was time to talk about the future. He told them that there were foremen positions opening up that they could move into and that they could be making $16.50 an hour in 3 months. Gleason also said that he wanted the unfair labor practice charges dropped. They had a subsequent telephone conversation in which Sutter informed Gleason he was quitting and gave a week's notice. During his last week, Gleason came to the jobsite where Sutter was working and again asked him what he wanted in order to stay on. Sutter said he wanted $16.50 an hour and a company truck. Gleason said they could talk about it but that he also wanted to talk about getting the charges dropped. They had no further discussion about it before Sutter left the Respondent's employ.

Gleason testified that he had a meeting with Sutter and Weyker about a week after the union election at their request. They asked for the opportunity to have their own crews and to run their own jobs and both requested wage increases and truck allowances. He did not offer them a wage increase or say they could get $16.50 an hour. He discussed their requests with his superiors and talked again with each of them separately. He told them the Company would offer an incentive program during a 3-month trial period whereby if the jobs they ran turned out well they could receive a bonus. He did not attempt to calculate what the bonus would be worth to them. He denied that he ever told either of them that the bonus program was contingent on the unfair labor practice charges being dropped.

[8] Kuhn's and Gleason's conflicting versions of the restaurant meeting cannot be reconciled. I find that there is no reasonable basis to conclude that Kuhn may have merely misunderstood what Gleason said.

Analysis and conclusions

I credit the consistent and mutually corroborative testimony of Weyker and Sutter[9] about Gleason's offers of improved wages and benefits following the Union's election defeat that were accompanied by his suggestion that the charges filed with the Board should be dropped. They had nothing to gain by fabricating such a story, which was consistent with the fact that the conversations occurred at a time when they and several other employees were considering leaving for new employment and that the Respondent was interested in keeping them. Gleason's elaborate and self-serving attempt to explain away these conversations by claiming he was merely informing them about a new trial program in which they could earn bonuses for running jobs was neither credible nor corroborated by an other evidence that such a program ever existed. Although Gleason may not have specifically made the increases in wages and benefits contingent on the dropping of the charges or explained how it would be done, he clearly implied that dropping the charges was a quid pro quo for these improvements. By promising benefits to employees in order to induce them to withdraw charges filed with the Board, the Respondent violated Section 8(a)(1). *A.P.R.A. Fuel Oil*, 309 NLRB 480 (1992).

C. *The 8(a)(3) Allegations*

The complaint alleges that several employees who were involved in or supported the Union's organizing campaign were discriminatorily laid off in late January and early February in violation of Section 8(a)(3) and (1) of the Act.[10] The Respondent contends that these layoffs were not discriminatory and were consequences of the lack of work that resulted from the unusually severe winter weather conditions existing at that time. In cases where the employer's motivation for taking certain actions is in issue, those actions must be analyzed in accordance with the test outlined by the Board in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under *Wright Line*, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. Once that has been done, the burden shifts to the respondent to demonstrate that it would have taken the same action even in the absence of protected activity on the part of its employees.

Although counsel for the General Counsel contends that the layoffs were based on a pretextual claim of lack of work, I do not agree. There is no evidence to contradict the testimony of Cleary, which I found credible, that the weather during the period coinciding with the layoffs was unusually severe, delayed several projects the Respondent was working on, and made it impossible to work on EIFS projects. The evidence shows that the total number hours worked by all employees was down sharply in February and more so in March and that almost all of the employees, not only the alleged discriminatees, were laid off due to lack of work for some time. I, however, do find that the General Counsel has made a prima facie case that the selection of employees for layoff was discriminatory. In almost every case, the alleged discriminatees were laid off sooner and were off longer than some of the other employees. There can hardly be stronger evidence than the statements of Gleason, as established by the credited testimony of Sutter and Weyker discussed above, that they along with Kuhn, Wilcox, and Larkee had been laid off because they had gone to the Union. Similarly, the credited testimony of Kuhn concerning the meeting at the restaurant was that Gleason admitted that laying off Sutter and Weyker was ''wrong'' and that Kuhn, who regularly worked with Sutter, was ''a victim of that circumstance.'' There is evidence that each of these employees had worked on the jobsite in Mequon, Wisconsin, during January, when contacting the Union was being discussed and that the Respondent, through its supervisor Cleary, was aware of those discussions. The evidence also shows that the Respondent was aware of Dixon's support for the Union since he openly expressed it to Gleason when he came to the Mequon site and tried to dissuade the employees from seeking representation. There is evidence that the Respondent had reason to suspect that employee Robert Czajkowski was a union supporter based on his credible and uncontradicted testimony that he had discussed and expressed his interest in the Union during a conversation with Weyker at a jobsite in Green Lake, Wisconsin, while in the presence of Supervisor Steve Disterhaft. There is ample evidence of the Respondent's union animus in the violations of Section 8(a)(1) found here and its opposition to the Union's organizing campaign. Accordingly, I find that there is sufficient evidence to support the inference that Sutter, Weyker, Kuhn, Wilcox, Larkee, Dixon, and Czajkowski were selected for layoff because of their activity and support for the Union.

I find that the Respondent has not established that it would have taken the same action with respect to the named discriminatees in the absence of protected activity on their part. It relies primarily on the testimony of Cleary who said that he made the decisions as to when and whom to lay off and recall. He said that he made his decisions based on the employees' skills, training, and experience and willingness to travel. He, however, offered little beyond ''lack of work'' to explain the reasoning underlying his decisions to lay off individual employees while others continued to work. The few specific reasons he did offer cannot withstand scrutiny and were pretextual. To begin with, during January, Cleary had been involved in the preparation of written employee evaluations on which annual wage increases were based. These would presumably have provided an up-to-date indication and comparison of each employee's ''ability and how he's performing on the job,'' yet, none were produced in support of Cleary's layoff and recall decisions. I infer that they would not have supported the Respondent's position as to why certain employees were laid off while others were not.

Cleary testified that Sutter and Weyker were laid off because they were unwilling to travel and, in Sutter's case, he lacked reliable transportation. The evidence shows that during his employment Weyker had worked outside of Milwaukee and even outside of Wisconsin on several occasions and that his December 1993 request to be assigned to jobs in the

[9] Although Sutter erroneously placed the first of these conversations as occurring before the election, Gleason does not deny having the conversations and confirmed Weyker's testimony that the first conversation was a week or 10 days after the election.

[10] All of the alleged discriminatees were eventually recalled by the Respondent. Some declined and others returned to work, but by the date of the hearing all had left the Respondent's employ.

Milwaukee area was based on the fact that his wife was due to deliver a baby in early 1994. In fact, the baby arrived on February 9 while Weyker was assigned to a job in Green Lake, Wisconsin, which is 60 to 70 miles northwest of Milwaukee. Weyker was informed that he was laid off that same day. Although his reason for wanting to work in the Milwaukee area was over, he was not recalled until the week of April 16, to a job in Wausau, Wisconsin, some 200 miles from Milwaukee. While Sutter was on layoff, at least four other employees were working at least some of the time at a jobsite in West Bend, a mile and a half from Sutter's residence. The Respondent has provided no reason why there was no work for Sutter on this job where neither distance nor transportation was a problem.[11] In fact, that was the job to which Sutter was assigned when he was recalled in April. Both Sutter and Weyker were relatively senior employees whose skills and experience the Respondent obviously valued considering Gleason's attempt to keep them on as project leaders once the election was over and the Union had lost, yet they were among the first laid off and last recalled. The evidence does not support a finding that the Respondent would have taken the same actions in laying off and delaying the recall of the alleged discriminatees in the absence of their support for the Union. On the contrary, I find that the evidence as a whole supports a finding that the Respondent took these actions in order to retaliate against them for, and undermine, that support. In so doing it violated Section 8(a)(3) and (1) of the Act. *Alson Knitting*, 301 NLRB 758, 762 (1991); *Reno Hilton*, 282 NLRB 819, 841–842 (1987).

### IV. THE ELECTION OBJECTIONS

The Union's objections to the election were based on certain of the incidents alleged in the complaint to have violated Section 8(a)(1) and (3) of the Act.[12] Although most of these objections involved conduct occurring before the critical period commenced, having found that the Respondent unlawfully informed employees that they and others had been laid off because of their support for the Union and that, on February 28, the Respondent unlawfully laid off another employee, Ronald Dixon, in retaliation for that support, which occurred during the critical period between the filing of the petition on February 22 and the election on April 7, I find that the Union's objection based on that action has been sustained, that this coercive and discriminatory conduct prevented the holding of a fair and free representation election in Case 30–RC–5561, and that the election should be set aside.

[11] When asked by the Respondent's counsel why employee Steve Straka, who was hired more than a year and a half after Sutter, was recalled to work before Sutter, Cleary's only explanation was that Sutter was unwilling to travel to the jobs on which Straka worked. He, however, gave no explanation as to why Straka, before he was laid off, worked on the Kohn jobsite for all or parts of 4 weeks during February and March while Sutter was on layoff.

[12] Allegations that the Respondent unlawfully interrogated an employee at the Von Schledorn jobsite during early February 1994 and at a Madison jobsite during the last 2 weeks of February were voluntarily dismissed at the hearing. The Union withdrew the objection corresponding to the allegation concerning interrogation at the Von Schledorn jobsite.

### CONCLUSIONS OF LAW

1. The Respondent, Thermal Masters, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by

(a) Threatening employees with business closure and loss of benefits because of their support for the Union.

(b) Telling employees that they and other employees had been laid off because of their support for the Union.

(c) Offering employees benefits if the Union lost the representation election.

(d) Offering employees benefits if unfair labor practice charges were dropped.

4. The Respondent violated Section 8(a)(1) and (3) of the Act by laying off employees Sutter, Weyker, Kuhn, Larkee, Wilcox, Dixon, and Czajkowski because of their support for the Union.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. The Respondent's coercive and discriminatory conduct in laying off an employee during the critical period prior to the election because of his support for the Union prevented the holding of a fair and free election in Case 30–RC–5561; therefore, the Union's objection is sustained and the election held on April 7, 1994, is set aside.

### THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent discriminatorily laid off employees Tim Sutter, Paul Weyker, Robert Kuhn, Todd Larkee, Richard Wilcox, Ronald Dixon, and Robert Czajkowski, it must make them whole for any loss of earnings or other benefits suffered by reason of that discrimination, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest, computed as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The election held in Case 30–RC–5561 will be set aside and the Regional Director will conduct a new election when he deems the circumstances will permit the fair and free choice of a bargaining representative.

On the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

### ORDER

The Respondent, Thermal Masters, Inc., Milwaukee, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Threatening employees with business closure or loss of benefits because of their support for the Union or any other labor organization.

(b) Telling employees they were laid off because of their support for the Union or any other labor organization.

(c) Offering employees benefits if the Union loses a representation election.

(d) Offering employees benefits if unfair labor practice charges are dropped.

(e) Discriminatorily laying off employees because of their support for the Union or any other labor organization.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole Tim Sutter, Paul Weyker, Robert Kuhn, Todd Larkee, Richard Wilcox, Ronald Dixon, and Robert Czajkowski for any loss of earnings or other benefits suffered as a result of their discriminatory layoffs. Backpay and interest due hereunder shall be computed in the manner prescribed in the remedy section of this decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its facility in Milwaukee, Wisconsin, copies of the attached notice marked ''Appendix.''[14] Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''